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No. 01-972

IN THE

Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,

v.

CITY OF CHESTER, COUNTY OF DELAWARE, and NORFOLK SOUTHERN RAILWAY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL RAILROAD PASSENGER CORPORATION IN SUPPORT OF RESPONDENTS

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February 2002

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL RAILROAD PASSENGER CORPORATION IN SUPPORT OF RESPONDENTS

The National Railroad Passenger Corporation ("Amtrak") respectfully moves pursuant to this Court's Rule 37(b) for leave to file its brief *amicus curiae* in opposition to the petition for writ of certiorari filed by the Pennsylvania Public Utility Commission ("PUC"). Petitioner PUC and Respondents City of Chester and the County of Delaware consent to Amtrak's filing of this brief. Respondents Norfolk Southern Railway Company [1] and the Pennsylvania Depart-

[1] As of June 1, 1999, Norfolk Southern Railway Company succeeded to Consolidated Rail Corporation's ("Conrail") operating rights on the rail line that passes beneath the public highway bridge that is at issue in this case.

ment of Transportation have refused to consent.[2] Original written statements of consent have been filed with the Clerk of this Court.

Amtrak's accompanying brief urges this Court to deny the PUC's petition for a writ of certiorari. In the underlying action, the Pennsylvania Commonwealth Court issued an order instructing the PUC to consider assessing Amtrak for the costs of maintaining a public highway bridge (the Lloyd Street Bridge) in violation of the Rail Passenger Service Act, 49 U.S.C. § 24301(*l*)(1), which exempts Amtrak from such costs. The Commonwealth Court's decision contradicts the holdings of *all* federal circuit and district courts which have addressed the issue. The PUC nonetheless ordered Amtrak to pay a portion of the costs for the Lloyd Street Bridge. The PUC's order directly benefits the named Respondents, who otherwise would be required to pay the portion of the costs assessed to Amtrak.

The issue raised by this petition should be resolved in ongoing proceedings initiated by Amtrak before the Eastern District of Pennsylvania pursuant to 49 U.S.C. § 24301(*l*)(2). In response to the PUC's order, Amtrak sought declaratory and injunctive relief pursuant to 49 U.S.C. § 24301(*l*)(2) before the U.S. District Court for the Eastern District of Pennsylvania. The very issues raised in the PUC's petition have been fully briefed and argued in Amtrak's action in the district court.

In this Court, the PUC names as "Respondents" other parties to the Commonwealth Court decision whose position on the underlying issue of Amtrak's exemption is precisely the same as the PUC's. That is, both Petitioner PUC and Respondents seek a ruling that will hold Amtrak liable for a

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[2] Although Amtrak's brief is submitted nominally in support of Respondents, Amtrak and Respondents hold opposing views on the merits of this case, as will be made clear in the brief that follows.

portion of the cost of maintaining the Lloyd Street Bridge. This Court customarily refuses to entertain suits "which disclose[] a want of a truly adversary contest, of a collision of actively asserted and differing claims," as such suits present no Article III case or controversy. *See Poe v. Ullman*, 367 U.S. 497, 505 (1961); *see also Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). As the federally-subsidized corporation whose federal exemption is at issue, Amtrak is uniquely situated both to provide the missing adversarial viewpoint so critical to this Court's deliberations and to aid this Court's consideration of the important federal interests at stake.

Accordingly, Amtrak respectfully requests leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether Amtrak's federal exemption (49 U.S.C. § 24301(*l*)(1)) from any "tax, fee, head charge, or other charge, imposed or levied by a State" prevents the Pennsylvania Public Utility Commission from assessing Amtrak for the repair and maintenance of public highway bridges where the Third Circuit and other federal courts have held unanimously that Amtrak is exempt from such costs?

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF *AMICUS CURIAE* OF THE NATIONAL RAILROAD PASSENGER CORPORATION IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37(2) of the Rules of the Supreme Court of the United States, the National Railroad Passenger Corporation ("Amtrak") [1] respectfully opposes the issuance of a writ of certiorari requested by Petitioner Pennsylvania Public Utility Commission ("PUC") to review an order of the Pennsylvania Supreme Court issued on October 5, 2001.

[1] This brief was authored by counsel for Amtrak. No persons or entities other than Amtrak made any monetary contribution to its preparation or submission.

INTEREST OF *AMICUS CURIAE*

Amtrak is a federally-subsidized corporation that was established by Congress to operate passenger train service throughout the United States. Under 49 U.S.C. § 24301(*l*)(1), Amtrak is exempt from all state and local "taxes, fees, head charges, or other charges." Although Amtrak was not a party to the proceedings before the Commonwealth Court of Pennsylvania whose order is at issue in this petition,[2] the burden of the order falls squarely on Amtrak. The Commonwealth Court remanded issues regarding the Lloyd Street Bridge in the City of Chester, Delaware County, Pennsylvania, to the PUC and directed the PUC to consider imposing public highway bridge maintenance responsibilities on Amtrak. The Commonwealth Court found that Amtrak's exemption from state and local taxes, fees, head charges, or other charges pursuant to 49 U.S.C. § 24301(*l*)(1) does not extend to special assessments for Pennsylvania public highway bridge repair and maintenance.

OPINIONS BELOW

The order of the Pennsylvania Supreme Court denying the PUC's Petition for Allowance of Appeal from an opinion of the Commonwealth Court of Pennsylvania (Pet. App. 1a) is unreported.

The opinion of the Commonwealth Court of Pennsylvania (Pet. App. 2a) is reported at 773 A.2d 1280 (Pa. Commw. Ct. 2001).

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[2] The PUC erroneously requests a writ of certiorari directed to the Supreme Court of Pennsylvania. The petition should have requested a writ directed to the highest court that ruled on the merits below, which in this case is the Commonwealth Court of Pennsylvania. *See, e.g., Faretta v. California*, 422 U.S. 806, 812 (1975).

JURISDICTION

The disputed order of the Commonwealth Court of Pennsylvania was entered on April 27, 2001. On October 5, 2001, the Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal thereof filed by the PUC. Pet. App. la. The petitioner asserts that jurisdiction exists in this Court under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The petitioner requests that this Court review an order by the Commonwealth Court of Pennsylvania which vacated a PUC bridge maintenance cost allocation order regarding the Lloyd Street Bridge located in the City of Chester, Delaware County, and which remanded the case with instructions that the PUC consider imposing such costs upon Amtrak. The Commonwealth Court based its order upon a determination, contrary to decisions issued by that same court and *all* federal circuit and district courts that have addressed this issue, that Amtrak's exemption from state and local taxes, fees, head charges, or other charges pursuant to 49 U.S.C. § 24301(*l*)(1) does not extend to special assessments for Pennsylvania highway bridge construction, repair, and maintenance costs.

This Court should not address this anomalous decision by an intermediate state court for several reasons. First, this Court does not possess Article III jurisdiction over this issue, because no case or controversy is presented when, as here, the interests of the Petitioner and all Respondents are aligned in support of a proposed outcome which disfavors non-parties. Second, the federal court decisions on this issue of federal law are unanimous, and the Pennsylvania Commonwealth Court decision merely represents a misapplication of a properly stated rule of law. Third, Petitioner PUC, Respondent Norfolk Southern Railway Company ("Norfolk Southern"), and *amicus* Amtrak already have briefed and argued the issues presented herein before the United States

District Court for the Eastern District of Pennsylvania in proceedings which Amtrak initiated under 49 U.S.C. § 24301(*l*)(2). Amtrak therefore respectfully requests that the instant petition be denied.

Finally, the PUC seeks here the same relief that it sought unsuccessfully from this Court in 1996. Then, as now, the PUC petitioned this Court for a writ of certiorari from another decision of the very same state court in a case in which the Commonwealth Court had ordered the PUC to consider assessing public highway bridge maintenance costs against Amtrak. *See City of Philadelphia v. Pennsylvania Pub. Util. Comm'n*, 676 A.2d 1298 (Pa. Commw. Ct.), *allocatur denied*, 682 A.2d 558 (1996), *cert. denied*, 520 U.S. 1155 (1997). The *City of Philadelphia* case presented the same legal issues as does this case and was before this Court in the same procedural posture. Amtrak opposed the PUC's petition on identical grounds, and this Court denied certiorari. *See* 520 U.S. 1155 (1997). The same result should follow here.

A. Background

1. *Amtrak is Exempt From State and Local Taxes and Fees.*

Amtrak was established in 1971 as a "for-profit" corporation to provide intercity passenger train service throughout the United States in the wake of bankruptcies declared by the major passenger rail providers in the 1970's. 45 U.S.C. § 541. In an effort to reduce Amtrak's subsequent reliance on federal subsidies, in 1979, Congress directed the Secretary of Transportation to study ways to reduce federal outlays to Amtrak, including a possible reduction in Amtrak's state and local tax liability. In his 1980 report to Congress, the Secretary estimated that these taxes would cost Amtrak more than $14 million in the upcoming year alone. S. REP. NO. 253, 97th Cong., 1st Sess. 103 (1981).

The Secretary concluded, and Congress agreed, that "state and local taxes on a primarily Federal investment are inappropriate." *Id.* As a result, Congress passed temporary legislation to exempt Amtrak from all state or local taxes for a one-year period. *Department of Transportation And Related Agencies Appropriation Act*, 1982 Pub. L. No. 97-102, 1981 U.S.C.C.A.N. (95 Stat.) 1442, 1451. The Senate Appropriation Committee Report explained the reasoning for the exemption as follows:

> [S]uch taxation serves to erode the revenue-to-cost ratios which impact on whether States and localities continue to receive the benefit of Amtrak services. The Committee believes it is unreasonable for Federal funds to be granted to Amtrak to provide a tax windfall to States and localities, and consequently the bill prohibits Amtrak from using any appropriated funds or assets for the payment of any State and local taxes.

S. REP. NO. 253, 97th Cong., 1st Sess. 103 (1981).

On September 10, 1982, pursuant to Public Law 97-257, 96 Stat. 852, Congress made permanent Amtrak's tax exemption from state and local taxes and fees:

> Notwithstanding any other provision of law, the National Railroad Passenger Corporation . . . shall be exempt from any taxes or other fees imposed by any State, political subdivision of a State, or local taxing authority which are levied on [Amtrak] . . . from and after October 1, 1981 . . . .

45 U.S.C. § 546b.[3]

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[3] As part of an overall recodification of the United States Code, Section 546b was repealed by Pub. L. No. 103-272, 108 Stat. 1379, 1393, and reenacted with linguistic, but not substantive changes. *See* H.R. REP. NO. 180, 103 Cong., 1st Sess. 1, 3, 5 (1993). It was recodified at 49 U.S.C. § 24301(*l*)(1), which provides that "Amtrak . . . [is] exempt from a tax, fee . . . or other charge, imposed or levied by a State, political

In the legislative history of this second enactment, Congress reiterated its judgment that the states which benefit from Amtrak services should be required to contribute to the continuation of Amtrak's operations through tax relief. S. REP. NO. 516, 97th Cong., 2d Sess. 170 (1982). This legislative history documents Congress' clear intention that Amtrak's immunity from state and local taxation be as broad as the federal government's immunity from such taxes. *See* H.R. REP. NO. 81, 97th Cong., 1st Sess. 21 (1981) (The Committee bill "exempts Amtrak from the payment of all state and local taxes, . . . *to the same extent the United States is exempt* from the payment of such taxes and other fees.") (emphasis added). Thus, like the United States, Amtrak is exempt from all state and local taxes and other fees. *See National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n*, 665 F. Supp. 402 (E.D. Pa. 1987), *aff'd*, 848 F.2d 436, 440 (3d Cir.) ("*Amtrak I*"), *cert. denied*, 488 U.S. 893 (1988); *Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, 826 F. Supp. 1506 (E.D. Pa. 1993) ("*SEPTA*"), *aff'd*, 27 F.3d 558 (3d Cir.), *cert. denied*, 513 U.S. 928 (1994).

2. *Amtrak's Federal Exemption Has Been Upheld Unanimously by the Federal Courts.*

Congress also expressly provided a mechanism for Amtrak to enforce this tax exemption through civil actions brought in the federal district courts. In the event that a state or locality

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subdivision, or local taxing authority . . . after September 30, 1981." The section was amended again by the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570, 2584 (1997), and now exempts Amtrak from any "tax, fee, head charge, or other charge, imposed or levied by a State, a political subdivision or local taxing authority[.]" Pub. L. No. 105-134, § 208, 111 Stat. at 2584.

attempts to impose a tax or fee on Amtrak in violation of Section 24301(*l*)(1), Amtrak can look to the federal district courts for protection:

> [T]he district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak.[4]

49 U.S.C. § 24301(*l*)(2); *see, e.g., Department of Revenue and Taxation of Wyo. v. National R.R. Passenger Corp.*, 1982 WL 1584 (D. Wyo. Dec. 15, 1982) (holding that Amtrak's tax exemption is a valid exercise of Congress' power and prohibiting state from recovering taxes from Amtrak); *National R.R. Passenger Corp. v. New Castle Cty*, 633 F. Supp. 354 (D. Del. 1986) (upholding constitutionality of Amtrak's exemption and ordering refund of taxes paid by Amtrak after effective date).

Thirteen years ago, Amtrak sought protection from costs imposed by Petitioner PUC, when the PUC ordered Amtrak to pay a portion of the replacement costs for a public highway bridge carrying a city street over tracks owned by Amtrak. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n*, 665 F. Supp. 402 (E.D. Pa. 1987). When Amtrak brought an action for declaratory and injunctive relief in the Eastern District of Pennsylvania, the district court carefully reviewed the Congressional intent underlying Amtrak's exemption and concluded:

> The extensive federal involvement [in] Amtrak's management, finances and operations make it apparent that the legislative exemption should be liberally construed

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[4] 45 U.S.C. § 546b, the predecessor to 49 U.S.C. 24301(*l*)(2), granted original jurisdiction to the federal courts "notwithstanding the provision of § 1341 of title 28," the anti-tax injunction act. In the recodification of this provision, this language was omitted as "surplus." H.R. REP. NO. 180, 103d Cong., 1st Sess. 123 (1993).

> to effectuate its goals. Section 546b is no mere exemption of an essentially private entity in exchange for some other benefit to the federal government. Rather, it is an attempt to guarantee Amtrak's fiscal integrity, and indeed its survival. The federal government has pursued governmental functions and policies through Amtrak. It would be inappropriate to undermine those goals through the too stingy construction of the exemption offered by the defendants.

Id. at 411. The court therefore issued both a declaratory judgment that Section 24301(*l*)(1) precluded PUC assessments for the construction or maintenance of highway bridges, and a permanent injunction against future allocations of such costs for the bridge at issue.

The PUC appealed to the U.S. Court of Appeals for the Third Circuit, which affirmed, finding that "[t]he statute's text, its legislative history, and analogous caselaw persuade us to give the exemption . . . a broad interpretation that fulfills the intent of Congress." *Amtrak I*, 848 F.2d at 440. The Third Circuit also held that "Amtrak's immunity from local 'taxes or other fees' . . . extends to assessments for local improvements of the kind at issue here." *Id.* The PUC's subsequent petition to this Court for a writ of certiorari was denied. *Pennsylvania Pub. Util. Comm'n v. National R.R. Passenger Corp.*, 488 U.S. 893 (1988).

Every federal court that has considered the scope of Amtrak's Section 24301(*l*) exemption has affirmed the Third Circuit's holding in *Amtrak I*.[5] For example, in 1991, the

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[5] *See Wheeling & L.E.R.R. v. Pennsylvania Pub. Util. Comm'n*, 141 F.3d 88, 95-96 (3d Cir. 1998) (declining PUC's request to overrule *Amtrak I* and *SEPTA*), *cert. denied* 523 U.S. 928 (1999); *National R.R. Passenger Corp. v. Pennsylvania*, 1991 WL 998 (E.D. Pa. Jan. 2, 1991); *Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, 802 F. Supp. 1273 (E.D. Pa. 1992); *SEPTA*, 826 F. Supp. 1506 (E.D. Pa. 1993).

PUC ordered Amtrak to repair and maintain (as opposed to replacing) the same highway bridge at issue in *Amtrak I*. In the resulting Section 24301(*l*)(2) proceeding, the district court again analyzed Section 24301(*l*) and determined that such orders constituted unlawful state and local taxes and fees. *National R.R. Passenger Corp. v. Pennsylvania*, 1991 WL 998 (E.D. Pa. Jan. 2, 1991) ("*Amtrak II*").

The same result obtained two years later when the PUC attempted to impose highway bridge assessments on the Southeastern Pennsylvania Transportation Authority ("SEPTA"), the Philadelphia commuter rail operator to which Congress extended the *same* federal exemption from state and local taxes and fees that Amtrak enjoys. 49 U.S.C. § 24301(f) (2001) (formerly 45 U.S.C. § 581(c)(5)) [6]; *SEPTA*, 826 F. Supp. 1506. When the PUC and the Commonwealth Court of Pennsylvania assessed SEPTA for the maintenance of four public highway bridges that pass over tracks owned by SEPTA, the Eastern District granted SEPTA a permanent injunction against PUC assessments for their construction, design, maintenance, inspection or repair. *SEPTA*, 826 F. Supp. at 1511. On appeal, the Third Circuit *again* affirmed that such assessments constituted a prohibited "tax or fee", and this Court denied the PUC's resulting petition for a writ of certiorari.[7]

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[6] 45 U.S.C. § 581(c)(5) stated that local commuter authorities "shall be exempt from the payment of any taxes or other fees to the same extent [Amtrak] is exempt." 45 U.S.C. § 581 was repealed by Pub. L. 103-272, 37(b), 108 Stat. 1379, on July 5, 1994, and reenacted and recodified in 49 U.S.C. § 24501(g). This provision was subsequently moved and now appears at 49 U.S.C. § 24301(f), which provides that "[a] commuter authority . . . is exempt, effective October 1, 1981, from paying a tax or fee to the same extent Amtrak is exempt."

[7] Subsequently, on January 19, 1996, the Eastern District of Pennsylvania approved a Consent Decree between SEPTA and the PUC in which the PUC agreed that "[u]nder 49 U.S.C. § 24301(*l*) and

Among the 46 states in which Amtrak operates, the Commonwealth of Pennsylvania alone continues to assess Amtrak for local public improvements. Other states have accepted and followed the consistent and unanimous reasoning of the Third Circuit and the district courts in holding that § 24301(*l*)(1) prohibits states and localities from assessing local improvements against Amtrak.[8]

B. The Decisions Below

The underlying dispute arose from the PUC's issuance of an order dated September 1, 2000, requiring parties other than Amtrak to share the costs of repairing and maintaining a three-span bridge which carries Lloyd Street in the City of Chester over a below-grade railroad right-of-way owned by Amtrak ("the Lloyd Street Bridge"). The bridge was constructed in 1899 by the Pennsylvania, Washington and Baltimore Railroad Company, and Amtrak acquired the right-

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24501(*g*), the Commission is barred hereafter from assessing or continuing to assess upon SEPTA the cost or responsibility for design, construction . . . or repair of any Highway Bridge . . . ." *See Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, Civil Action No. 95-CV-4500 (E.D. Pa. Jan. 19, 1996). Pet. App. 60a..

[8] The Second Circuit's decision in *National R.R. Passenger Corp. v. City of New York*, 882 F.2d 710 (2d Cir. 1989) is not to the contrary. The *City of New York* case addressed consensual agreements under which Amtrak paid the City of New York regularly renegotiated rents for the right to operate through subterranean, city-owned rights of way. The Second Circuit contrasted those with the assessments addressed in *Amtrak I*, and expressly distinguished *Amtrak I* noting that "the circumstances presented to us *so clearly concern an area not within the parameters of section [24301(l)]* that is unnecessary to consider the tax immunity rules considered by the Third Circuit." *Id.* at 716 n.2 (emphasis added). Judge Newcomer of the Eastern District of Pennsylvania also has considered and distinguished *City of New York* from the situation presented by PUC bridge cost assessments. *Amtrak II*, 1991 WL 998, at *4 n.4; *accord Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, 802 F. Supp. 1273, 1280 (E.D. Pa. 1992).

of-way running below the bridge through the congressionally-mandated conveyance process established by the Regional Rail Reorganization Act of 1973. *See* 45 U.S.C. §§ 701 *et. seq.* Amtrak does not, however, own the bridge. *City of Philadelphia v. Consolidated Rail Corp.*, 747 A.2d 352, 354-55 (Pa. 2000) (Amtrak does not own public highway bridges crossing its right-of-way).

Following a PUC investigation, hearings were held before PUC Administrative Judge Herbert Smolen who determined that the City of Chester should provide 75% of the bridge's maintenance and repair costs, and that Conrail, the County of Delaware and the Pennsylvania Dept. of Transportation should provide the remaining 25%. Pet. App. 7a. Judge Smolen's Recommended Decision also held that Section 24301(*l*)(1) exempted Amtrak from the assessment of such costs based upon the Third Circuit's decision in *Amtrak I.*[9] This Recommended Decision was adopted by the PUC, and subsequently appealed to the Pennsylvania Commonwealth Court by the City of Chester, the County of Delaware, and Conrail on the grounds that Amtrak was not exempted from such assessments pursuant to the Commonwealth Court's 1996 decision in *City of Philadelphia v. Pennsylvania Pub.*

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[9] Administrative Judge Smolen did discuss various Pennsylvania state cases which held that the PUC could allocate costs to Amtrak, but concluded that the PUC should adhere to the Third Circuit's holding in *Amtrak I. See City of Philadelphia v. Pennsylvania Pub. Util. Comm'n*, 676 A.2d 1298 (Pa. Commw. Ct. 1995), *allocatur denied*, 682 A.2d 558 (Pa. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Parkesburg Borough v. Pennsylvania Pub. Util. Comm'n*, 681 A.2d 872 (Pa. Commw. Ct. 1996); *City of Philadelphia v. Consolidated Rail Corp.*, Nos. 96-RR-01 and 96-RR-03 (Sp. Ct. R.R.R.A. Nov. 3, 1997), *rev'd City of Philadelphia v. Consolidated Rail Corp.*, 222 F.3d 990 (D.C. Cir. 2000).

Util. Comm'n, 676 A.2d 1298 (Pa. Commw. Ct.), *allocatur denied*, 682 A.2d 558 (Pa. 1996), *cert. denied*, 520 U.S. 1155 (1997).[10]

In the case below, the Commonwealth Court began its Section 24301(*l*) analysis with a detailed discussion of the *City of Philadelphia* decision. *City of Chester v. Pennsylvania Pub. Util. Comm'n*, 773 A.2d 1280, 1285-86 (Pa. Commw. Ct. 2001). Judge Pellegrini, the author of both the opinion below and the *City of Philadelphia* opinion, reiterated his earlier conclusion that bridge repair and maintenance costs were not "taxes." No mention was made of the Commonwealth Court's duty to accord the Third Circuit's judgment in *Amtrak I* full faith and credit as a prior federal judgment on the same issue between the same parties. Furthermore, the Commonwealth Court stated that "because the PUC is constrained to follow *City of Philadelphia*," the court vacated the PUC order and remanded the case to the PUC with instructions to allocate costs among existing parties as well as Amtrak and SEPTA. *Id.* at 11a.

Upon remand, a new Recommended Decision was issued on August 7, 2001, in which maintenance costs, as well as responsibility for providing flagmen, watchmen, and various materials for the Lloyd Street Bridge, were allocated to Amtrak. Pet. App. 15a, 35a-37a. That Recommended

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[10] In *City of Philadelphia*, a case decided eight years after *Amtrak I* and three years after *SEPTA*, the Commonwealth Court chose to revisit, *sua sponte*, the scope of Amtrak's § 24301(*l*)(1) exemption. Notwithstanding the clear and unanimous federal precedent on the issue, the Commonwealth Court held that an assessment for repairing and maintaining the public highway bridge at issue in that case was not a "tax or fee" from Amtrak should be exempt. 676 A.2d at 1309. The PUC's subsequent petitions for review of that decision were denied by both the Pennsylvania Supreme Court and this Court. *City of Philadelphia v. Pennsylvania Pub. Util. Comm'n*, 682 A.2d 558 (Pa. 1996) (denying allocatur), *cert. denied*, 520 U.S. 1155 (1997).

Decision was adopted in a final PUC order on September 7, 2001. Appeals from that order remain pending before the Commonwealth Court.

Amtrak did not appeal the PUC's order to the Commonwealth Court and is not a party to the proceedings in that court. Rather, Amtrak filed an action pursuant to 49 U.S.C. § 24301(*l*)(2) in the Eastern District of Pennsylvania to enforce its tax exemption and to compel the PUC's adherence to the Third Circuit's judgment in *Amtrak I. National Passenger R.R. Corp. v. Pennsylvania Pub. Util. Comm.*, Civil Action No. 01-CV-5570 (E.D. Pa.). In that case, Amtrak is seeking both a declaratory judgment to reaffirm its already well-established exemption from public highway bridge construction, maintenance, and repair costs, a permanent injunction against further cost assessments by the PUC relating to the Lloyd Street Bridge, and an injunction against the other parties to the Commonwealth Court proceedings to prevent them from seeking enforcement of the PUC's order.

The merits of Amtrak's and the PUC's positions have been fully briefed in the District Court and were argued before the Honorable Jan E. DuBois on January 11, 2002.[11] Thus, the issues that are the subject of the PUC's petition to this Court are currently before the proper, Congressionally designated forum, the Eastern District of Pennsylvania, pursuant to 49 U.S.C. § 24301(*l*)(2). Notwithstanding the pending federal actions, the PUC first submitted a petition for review of the Commonwealth Court's Decision to the Pennsylvania

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[11] SEPTA concurrently filed a Petition in the Eastern District to enforce its 1996 Consent Decree barring the PUC from imposing Bridge maintenance and repair costs pursuant to its parallel exemption at 49 U.S.C. § 24301(f). *Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, C.A. No. 95-4500 (E.D. Pa.). SEPTA's Motion to enforce the consent decree also has been fully briefed and also was argued before Judge DuBois on January 11, 2002.

Supreme Court which was denied without any published opinion on October 5, 2001,[12] and then filed a Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE PETITION

I. IN ITS CURRENT POSTURE, THIS MATTER DOES NOT PRESENT A "CASE OR CONTROVERSY" RIPE FOR REVIEW BY THIS COURT.

A. There Is No Genuine Adversity Between The Parties Before This Court.

Article III of the Constitution limits the judicial power of the federal courts to "cases or controversies." *Clinton v. City of New York*, 524 U.S. 417, 429 (1998); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990); U.S. CONST. art. III, § 1. "The basic inquiry is whether the 'conflicting contentions of the parties . . . present a real, substantial controversy between parties having *adverse legal interests*, a dispute definite and concrete, not hypothetical or abstract.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

Collusive suits brought by parties with a common interest in obtaining a decision adverse to a third party, as well as the Article III prohibition against issuing advisory opinions, are particular concerns where no *bona fide* conflict exists between at least two genuinely adverse parties. *Poe v. Ullman*, 367 U.S. 497, 505 (1961); *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (Article III "limit[s] the business of federal courts to questions presented in an adversary context"); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). As this Court also held in *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, the presence of adverse parties "sharpens the presentation of issues upon which the court so largely depends for illumination of

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[12] In the thirteen years of litigation on this issue between Pennsylvania and federally exempt transportation entities, the Supreme Court of Pennsylvania has never issued a decision addressing this issue.

difficult . . . questions." 445 U.S. 375, 382-83 (1980), quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) and *Baker v. Carr*, 369 U.S. 186, 204 (1962). *See also Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). Thus, this Court has refused to entertain cases "which disclosed a want of a truly adversary contest, of a collision of actively asserted and differing claims." *Poe*, 367 U.S. at 505.

These principles have been applied in several analogous cases. In *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971), where both Petitioner and Respondent requested that this Court hold that North Carolina's anti-busing statute was constitutional, this Court dismissed the appeal for lack of a case or controversy within the meaning of Article III. Similarly, in *United States v. Johnson*, 319 U.S. 302, 305 (1943), a tenant brought a "friendly suit" against a landlord under a federal rent control statute. The landlord challenged the constitutionality of the statute and the United States intervened. On appeal, notwithstanding the intervention of the United States, this Court ordered the case dismissed, holding that "[s]uch a suit is collusive because it is not in any real sense adversary. It does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process . . . ." *Id.* (citations omitted). *See also South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892) (no real controversy where control of both parties had come into the hands of the same persons).

The PUC's petition presents a textbook example of a collusive suit by parties desiring a judgment prejudicial to a non-party. From the earliest stages of the PUC proceeding, each Respondent's primary interest has been the minimization of its allocated costs and responsibility for public highway bridge maintenance. Respondents appealed to the Commonwealth Court claiming that Amtrak should bear a portion of the cost of maintaining the Lloyd Street

Bridge. Pet. App. at 9a. If the PUC were to prevail on the issue it presents to this Court, the Respondents would benefit by having Amtrak share the costs of maintaining public highway bridges that cross Amtrak's rights-of-way. The PUC, in turn, already has reassigned highway bridge maintenance costs from Respondents to Amtrak in reliance on the disputed Commonwealth Court decision, in spite of Amtrak's statutory exemption. Pet. at 7.

It is clear from an examination of the PUC's petition that the PUC and the Respondents lack the necessary adversity to invoke the jurisdiction of this Court. The PUC's position is completely aligned with the position of the Respondents, and indeed, with the very decision from which it appeals. In its petition, the PUC essentially urges this Court to affirm a Pennsylvania Commonwealth Court order remanding the Lloyd Street Bridge matter to the PUC with instructions to assign public highway bridge maintenance costs to Amtrak, in spite of Amtrak's exemption from state and local taxes, fees, head charges, or other charges.

In essence, the PUC's petition merely seeks an advisory opinion regarding whether the Commonwealth Court properly rejected long-standing federal court precedent and other Commonwealth Court decisions governing the scope of Amtrak's federal exemption. Article III does not permit this Court "to give advisory opinions about issues as to which there are not adverse parties before us." *Princeton University v. Schmid*, 455 U.S. 100, 102 (1982). Because the PUC and Respondents all seek "precisely the same result," i.e., additional parties against which to assess highway bridge maintenance and repair costs (*see Moore*, 402 U.S. at 48), this Court lacks jurisdiction to grant the PUC's petition.

B. This Issue Should Be Fully Adjudicated In The Lower Federal Courts Before Certiorari Is Granted

Congress specified the federal district courts as the proper forum in which to enforce Amtrak's exemption:

> The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak.

See 49 U.S.C. § 24301(*l*)(2). Moreover, under Article III, it would be inappropriate for the Court prematurely to take jurisdiction over this case. *See generally Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

As this Court stated in *Abbott Laboratories v. Gardner* regarding Article III ripeness, "the problem is . . . best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* Such an evaluation of this matter reveals that it is not ripe, both because the issue presented by the PUC clearly is not fit for review by this Court at this time, and because the PUC will not suffer any hardship if certiorari is denied.

The parties and Amtrak already are before the proper federal forum (short of this Court) to resolve the issues presented by the Commonwealth Court's remand order. As authorized by § 24301(*l*)(2), Amtrak initiated proceedings in the U.S. District Court for the Eastern District of Pennsylvania seeking an appropriate declaratory judgment and injunction. In that action, genuinely adverse parties are developing a full factual and legal record through extensive briefing and oral argument.[13] The district court proceedings

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[13] For example, the district court will address a question ignored by the Commonwealth Court—the obligation of the Pennsylvania state courts to

will serve the important role of focusing the issues to be resolved, after which the Third Circuit will have an opportunity to review all of the factual and legal developments that have occurred since its decision in *Amtrak I* thirteen years ago. Even more important, the lower federal courts will have the opportunity to reconsider the views of the Commonwealth Court and refine their own legal analyses.

Section 24301(*l*)(2) authorizes the district court to enforce Amtrak's exemption through appropriate declaratory and equitable relief. Indeed, the PUC itself should have sought a declaratory judgment in the federal district court regarding the scope of Amtrak's exemption from state and local taxes and fees.[14] Section 24301(*l*)(2) instructs the district courts to grant equitable or declaratory judgments, and the All Writs Act expressly authorizes the district court to "issue all writs necessary or appropriate in aid of their respective jurisdictions," including all auxiliary writs not specifically prohibited by Congress. 28 U.S.C. § 1651; *United States v. New York Tel. Co.*, 434 U.S. 159, 172-173 (1977), quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 273 (1942).

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accord full faith and credit to the prior opinions of the Third Circuit in *Amtrak I* and *SEPTA*. It is black letter law that state courts must accord full faith and credit to the judgments of federal courts, particularly on issues of federal law. *See, e.g., Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001) (citing *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938)).

[14] *See United States v. Allegheny County*, 322 U.S. 174 (1943), overruled *sub silentio* on other grounds, *United States v. City of Detroit*, 355 U.S. 466, 469 (1957) (scope of intergovernmental tax immunity is governed by federal law, because "where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures."). Even the Commonwealth Court envisioned that the lower federal courts would review its decision in the first instance, as it characterized its previous opinion as "an effort to convince the Third Circuit that [the Commonwealth Court's characterization was] the better view." *City of Philadelphia*, 676 A.2d at 1305.

Amtrak and SEPTA's actions in the district court seek injunctive relief to compel all participants in the Commonwealth Court proceedings to respect the prior judgments of the Third Circuit in *Amtrak I* and *SEPTA*. The injunctive order sought by Amtrak in the district court would resolve the dilemma the PUC claims to face. Thus, there can be no doubt that exercise of certiorari jurisdiction would be premature and frustrate the development of a proper appellate record.

II. THE PUC WILL SUFFER NO HARDSHIP FROM DENIAL OF REVIEW BY THIS COURT.

In addition, the PUC will not suffer any hardship if this Court denies its petition and allows the proceedings now pending in the district court to take their course. For the past thirteen years, the PUC has been barred from apportioning public highway bridge costs to Amtrak pursuant to *Amtrak I*. By its own admission, the PUC "has been operating under the strictures imposed by the federal courts since 1988, when [*Amtrak I*] was decided." Pet. at 4. Neither § 24301(*l*)(1) nor the Third Circuit's decision in *Amtrak I* prohibit the PUC from entering all orders necessary to eliminate any condition at a public rail-highway crossing that threatens public safety. Nor is the PUC prohibited from ordering all necessary actions by parties other than entities entitled to federal immunity (such as the United States, Amtrak, and SEPTA) to ensure that public highway bridges are maintained in safe condition. In short, the PUC's "ability to issue and enforce its orders" (Pet. at 11) is not "restricted" by Amtrak's exemption or the federal decisions enforcing it. The exemption affects only the PUC's cost allocation function, not its safety responsibilities.

Thus, the claimed hardship to the PUC created by the "direct and irreconcilable conflict" between federal court precedent and the latest decision of the Commonwealth Court is insubstantial. Any claimed hardship is properly addressed in the pending district court action. Only after the Eastern

District and the Third Circuit have reviewed this issue should this Court consider whether certiorari is appropriate. Accordingly, this Court should deny the PUC's petition.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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